

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-6087

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be argued by
MILTON WEINBERG

ARTHUR C. LOGAN MEMORIAL HOSPITAL,

Plaintiff-Appellee,

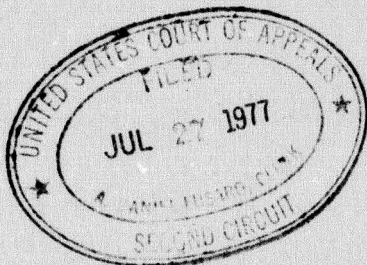
-against-

PHILIP L. TOIA, as Commissioner of
Social Services of the State of New
York, ROBERT P. WHALEN, as Commis-
sioner of Health of the State of
New York, HUGH L. CAREY, as Governor
of the State of New York, JOSEPH A.
CALIFANO, Secretary of the U.S.
Department of Health, Education
and Welfare, ABRAHAM D. BEAME, as
Mayor of the City of New York,
HARRISON J. GOLDIN, Comptroller of
the City of New York, and DONALD
KUMMERFELD, as Director of the Budget
of the City of New York, and as pro
tem Administrator of the Health and
Hospitals Corporation,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT

BRIEF OF DEFENDANTS-APPELLANTS, BEAME, GOLDIN,
KUMMERFELD AND THE BOARD OF DIRECTORS OF THE
NEW YORK CITY HEALTH AND HOSPITALS CORPORATION



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UNITED STATES COURT OF APPEALS
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ARTHUR C. LOGAN MEMORIAL HOSPITAL,

Plaintiff-Appellee,

-against-

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, HUGH L. CAREY, as Governor of the State of New York, JOSEPH A. CALIFANO, Secretary of the U.S. Department of Health, Education and Welfare, ABRAHAM D. BEAME, as Mayor of the City of New York, HARRISON J. GOLDIN, Comptroller of the City of New York, and DONALD KUMMERFELD, as Director of the Budget of the City of New York, and as pro tem Administrator of the Health and Hospitals Corporation,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
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BRIEF OF DEFENDANTS-APPELLANTS, BEAME,
GOLDIN, KUMMERFELD AND THE BOARD OF
DIRECTORS OF THE NEW YORK CITY HEALTH
AND HOSPITALS CORPORATION

Statement

The municipal defendants appeal from a preliminary injunction and order of the United States District Court for the Southern District of New York (Owen, J.), (92a)* entered May 23, 1977, which enjoins the New York City defendants "from committing any act to discontinue the emergency ambulance feeder

*Unless otherwise indicated, numbers in parentheses refer to pages in the JOINT APPENDIX.

service agreement presently in effect between plaintiff and the New York City Health and Hospitals Corporation" (93a).*

The services rendered by plaintiff are to dispatch ambulances within a designated area after a telephone call by a citizen to the Police Department requesting that an ambulance be sent because of an emergency medical situation. The person requiring these services is then taken to plaintiff Hospital.

ISSUE

The issue is whether the injunction was properly granted. We assert that it was not because plaintiff failed to establish a valid Federal claim. The complaint should have been dismissed.

PROCEEDINGS BEFORE THE DISTRICT COURT

No evidentiary hearing was held by the Court, on the motion for the preliminary injunction, but oral argument was heard on April 14, 1977 and April 21, 1977.

On April 14, 1977, at a hearing before Judge Owen, who had issued a temporary restraining order,**

*There is no agreement presently in effect between the plaintiff and the New York City Health and Hospitals Corporation (Complaint, par. 46 [16a]).

**It is difficult to understand how the cancellation of emergency ambulance services rendered by plaintiff can result in irreparable harm, or even any economic harm, since the complaint alleges that the plaintiff, by being compelled to provide medical care to emergency patients, pursuant to State Law, without regard to their ability to pay for those services, incurs an annual deficit of \$1,000,000 (¶¶17, 42, 43 [7a, 15a]).

the municipal defendants opposed the granting of a preliminary injunction on the ground that the proper parties were not before the Court since it was the Board of Directors of the New York City Health and Hospitals Corporation, by resolution, who had terminated the ambulance feeder services (29a Transcript 26).

Upon being apprised by counsel for the municipal defendants that the Board of Directors of the Hospital Corporation was not a defendant in the action, Judge OWEN stated that if the right person were not named as a defendant he would give the plaintiff leave to name the right person in five minutes. Counsel for the municipal defendants then agreed that the title could be amended to include the Board of Directors as party defendants. (Transcript 39, 42, 43)

Thereafter, the Court directed the Corporation Counsel's Office to check on the accuracy of a newspaper article in the New York Times concerning the cutting off of the ambulance service after inquiring whether the actions of the municipal defendants constituted a prima facie tort (Transcript 55, 56, 63).

The municipal defendants also submitted an affidavit showing that the plaintiff had commenced an earlier action in the United States District Court for the Southern District of New York (Bankruptcy No. 76 B 2425) against the City of New York for the sum of \$2,106,921.54 for services rendered to Medicaid patients in its hospitals. In that complaint, plaintiff alleged

that monies were being withheld because the City advised plaintiff that it owes substantial sums to the City, the latest estimates of those sums being approximately \$7,000,000 (38a). *

On April 21, 1977 the Corporation Counsel's Office submitted an affidavit from the General Counsel of the Hospitals Corporation in which counsel reported the reasons given to him, by six of the seven members of the Board of Directors, who voted to discontinue the ambulance feeder services with plaintiff (57a).

The Corporation Counsel's Office then requested the Court to dismiss the entire complaint sua sponte for failure to state a claim upon which relief can be granted (Transcript 83, 84). The Court declined to act on its own to dismiss the complaint. Instead, the Court granted an injunction finding irreparable injury and a strong showing of likelihood of success on the trial (Transcript 80). With respect to its refusal to dismiss the complaint, the Court stated that the motion would come on to be heard before him when plaintiff's counsel had a chance to respond (Transcript 83).

Opinions Below

On May 2, 1977, Judge OWEN issued a memorandum and order* (85a) expanding on his preliminary findings

*The District Court was in error in stating that the complaint as well as newspaper articles allege that the City has wrongfully withheld Medicare reimbursement monies (88a). The monies withheld, as stated in the complaint and a newspaper article, are solely Medicaid monies (6a, 27a).

of fact and conclusions of law that he had made after oral argument by counsel on April 21, 1977 when he issued the preliminary injunction restraining the cancellation of ambulance services. This opinion did not take cognizance of the defect in the complaint that it failed to state a claim upon which relief could be granted.

On May 18, 1977 the Court issued an "endorsed memorandum" holding that "the complaint alleges a wrongful withholding of federal Medicaid monies by defendants. There is, therefore, federal jurisdiction and allegations supporting a valid cause of action".*

COMPLAINT

The complaint seeks \$5,000,000 in punitive and exemplary damages against the City and State of New York.** It is alleged that the "City of New York and its agents and departments act in conspiracy and concert with others. . . . with a view toward rendering plaintiff to so precarious an economic impasse that liquidation must result, thus taking plaintiff from the field, so to speak, enhancing the economic interests of its own municipal system". (8a) The action is brought against the Mayor of the City of New York, the Comptroller of the City of New York and the Budget Director of the City of New York.

*For the convenience of this Court, the endorsed memorandum is annexed as Addendum "A".

**Neither the City of New York nor the State of New York is named as a defendant in the action.

The Commissioner of Social Services of the State of New York, the Commissioner of Health of the State of New York, and the Governor of the State of New York are also party defendants, as well as the Secretary of the United States Department of Health, Education and Welfare.*

The complaint alleges the following conspiratorial acts of the municipal defendants:

(a)

"STATUTORY CLAIMS

"49. The State and City defendants have violated and continue to violate the Medicaid Act and Regulations and the State Plan through which it implements the said Act by refusing to make reimbursements at the rates set by the defendants themselves. They have further placed unlawful ceilings on said reimbursement rates.

"50. The City and State defendants act in violation of the New York Public Health Law and the New York Social Service Law by arbitrarily denying plaintiff, Arthur C. Logan Memorial Hospital the reasonable costs of its inpatient and outpatient service provided to Medicaid clientele."

(b)

"CONSTITUTIONAL CLAIMS

"51. The defendants, City and State of New York's failure to pay the sums sued for herein, and the

*On April 28, 1977, H.E.W. moved for an order dismissing the complaint for lack of subject matter jurisdiction or alternatively for summary judgment (2a). The motion has not yet been decided by the District Court.

defendant, Secretary of Health, Education and Welfare's failure to insure compliance with the laws violates the supremacy clause of the U.S. Constitution, Article VI, in that the said acts are in contravention of Federal regulation in an area preempted by said regulations and legislation." (17a) (Emphasis supplied) The plaintiff alleges in paragraph 22 (10a) that the City of New York has wrongfully failed to reimburse plaintiff for \$2.12 million since the beginning of January 1976, which sums were due and owing to the plaintiff for services rendered pursuant to said Medicaid Act and the State Plan approved by H.E.W. See also ¶¶ 35, 36, 37 and 38 (13a, 14a).

(c)

The claim for \$2.12 million allegedly wrongfully withheld by the City had also been asserted by plaintiff against the City of New York in an action that was filed heretofore on March 18, 1977 in the United States District Court for the Southern District (Bankruptcy No. 76 B 2425) after the plaintiff filed its Chapter XI petition on October 26, 1976, pursuant to Bankruptcy Act Sections 301 et seq (36a).

Paragraphs 6 and 7 of that complaint reads as follows:

"6. In order to assure that the voluntary hospitals could continue to service Medicaid patients, a program was developed whereby agreed-upon advances against future billings were made to voluntary hos-

pitals by defendant as paying agent, pegged against historical billing cycles. In essence while these payments are classified as advances, they are in fact no more than payment for services actually rendered which could not be and have not been rendered by municipal hospitals.

"7. Internal accounting procedures unilaterally established by defendant have resulted in the creation by the defendant of what, in the case of plaintiff, amounts to an illusory indebtedness running from plaintiff to defendant on account of alleged overadvances. Defendant has, at various times, advised plaintiff that it owes substantial sums to defendant, the latest estimate of those amounts being approximately \$7 million. Plaintiff does not concede any liability to defendant." (37a, 38a)

The summary of assets and liabilities of plaintiff in the Chapter XI proceeding listed as a liability to the City "Medicaid over-advances, subject to offset, approx. \$6,255,000" (47a). Annexed thereto is an affidavit of William O. Allen, plaintiff's executive director, sworn to October 26, 1976. In his affidavit, Mr. Allen admits "that the city appears to have overadvanced to the hospital some \$6 million against Medicaid reimbursement requests" [par. 11(c), (50a)] [emphasis supplied] and states that "In recent months

the city has begun a program designed to reduce the outstanding over exposure on the previously described over-advances to all hospitals. . . . with the City withholding from each reimbursement check audit adjustment figures designed to repay the outstanding over-advances" [par. 11(c), 51a]; Mr. Allen explained that "By virtue of the filing of a petition under Chapter XI of the Bankruptcy Act, the City of New York will no longer be in a position to apply monies due the hospital as a debtor in possession against sums outstanding on pre-Chapter XI over-advances" [par. 12(b), (52a)]. (Emphasis supplied)

In an opinion*, dated May 3, 1977, Hon.

Joel LEWITTES, Bankruptcy Judge, stated in part on p. 6:

"Since the City's claim is therefore substantial, and not merely colorable, the bankruptcy court lacks jurisdiction over this controversy in the face of the objection raised in the motion to dismiss.

As this dispute, among others, is already before District Judge Owen, in a suit between the same parties (and others), 77 Civ. 1216, it seems, under Rule 915(b), appropriate not to dismiss this suit but to transfer it to Judge Owen.

The defense of want of summary jurisdiction is sustained. Submit order providing for disposition under Rule 915(b)." (Emphasis supplied)

*For the convenience of this Court, the opinion is annexed hereto as Addendum "B".

(d)

Plaintiff also alleges that the City and the State have refused to reimburse plaintiff for services rendered under the Ambulatory Care Ghetto Medicine Program instituted pursuant to Chapter 967 of the Laws of the State of New York for 1968, and that the City cancelled "A Community Mental Health and After Care Center" [par. 45 (16a)].

(e)

Another alleged Constitutional claim is in par. 52 which reads as follows:

"52. The methods and acts of the defendants State and City of New York with regard to the implementation of laws mandating unreimbursed treatment of the non-Medicaid eligible, yet indigent population violate the due process clause of the Fourteenth Amendment to the U.S. Constitution; Article I Sections 6 and 7 of the New York State Constitution, insofar as they are confiscatory in nature and deprive the plaintiff of property without due process of law or just compensation, and further deny plaintiff privileges and immunities and the equal protection of the law." (17a)

Paragraphs 7, 42 and 43 amplify this claim and allege that plaintiff is compelled to render emergency treatment to everyone, pursuant to Chapter 712 of the Laws of the State of New York for the year 1972. (Public Health Law §2505a).* Plaintiff further alleges

*The references to the laws are incorrect. Plaintiff is referring to New York State Public Health Law §2805-b as amended.

that as a result of being compelled to treat emergency patients who are NonMedicaid eligible, but "indigent" people, it suffers a \$1 million annual deficit* (7a, 15a)

(f)

Plaintiff also alleges in paragraphs 46, 47, 48 [16a, 17a] that the City, through its Health and Hospitals Corporation, has refused to formally execute contracts for emergency ambulance service with plaintiff since June of 1973 though plaintiff has continued to perform the "responsibilities and obligations pursuant to these contracts" of dispatching ambulances and treating emergency patients. Plaintiff further alleges that the City has indicated it would unilaterally and capriciously terminate such services at any time, which would cost the plaintiff a minimum of \$250,000 yearly, and that the clear design, intent and complicity of the City of New York is evident in the multi-dimensional efforts to bankrupt the plaintiff.

(g)

The complaint contains two paragraphs that are entitled "Jurisdiction and Venue" as well as other paragraphs alleging the jurisdiction with respect to specific claims asserted in the complaint against certain defendants.

The general statement of jurisdiction is as follows:

*The claim is asserted solely against the State in pars. 7, 42 and 43 and the relief requested is solely against the State of New York (7a, 15a).

"JURISDICTION AND VENUE

"18. This action arises under the Medicaid Act, 42 USC S.1396-1396i, and the regulations promulgated thereunder, 42 USC S.1983; the Administrative Procedure Act, 5 USC S.701-706; Article VI of the United States Constitution; the Fifth and Fourteenth Amendments to the United States Constitution; the New York State Constitution; the New York State Public Health Law; the New York State Social Services Law.

"19. Jurisdiction is vested in this Court under 28 USC S.1331, 1343, 1361, 2201, and 2202, 42 USC S. 1396(a) (g) and principles of pendent jurisdiction. The amount in controversy exceeds the sum of \$10,000.00 exclusive of interest and costs.

"20. Venue lies in this District pursuant to 28 USC S. 1391." (10a)

Additional allegations of jurisdiction are found in par. 4 (6a), which inexplicably refers to Articles I, V, XIV and VI of the United States Constitution, par. 9 (8a) and par. 52 (13a).

ARGUMENT

THE DISTRICT COURT ERRED IN GRANTING
THE PRELIMINARY INJUNCTION ENJOINING
THE NEW YORK CITY DEFENDANTS FROM
COMMITTING ANY ACTS TO DISCONTINUE
THE EMERGENCY AMBULANCE SERVICES
PERFORMED BY PLAINTIFF, SINCE THE
COMPLAINT FAILS TO STATE A CLAIM
UPON WHICH RELIEF CAN BE GRANTED.

(a)

The gravamen of the complaint against the municipal defendants appears to be an attempt to allege a prima facie tort to force plaintiff Hospital into liquidation while "enhancing the economic interests of its own municipal system" (par. 9 [8a]). It is further alleged these officials "act in Conspiracy and concert with others in denying the civil rights, privileges and immunities and equal protection of the laws to Arthur C. Logan Memorial Hospital... .." [(par. 9 (8a))]

It is hornbook law that plaintiff, to be entitled to a preliminary injunction restraining the cancellation of its ambulance services, must plead a claim in regard thereto which indicates that the Court has jurisdiction over the subject matter and that the complaint states a claim upon which relief can be granted. Thus if it is evident that the Complaint is devoid of merit, the Court has the power, on its own motion, to dismiss the complaint. Robins v. Rarback, 325 F. 2d 929, 930 (2d Cir., 1963), cert. denied 379 U.S. 974 (1965); 11 Wright & Miller, Federal Practice and

Procedure, §2950, at 490, fn. 58. See also United States v. Corrick, 298 U.S. 435, 440 (1936). We shall demonstrate that the District Court erred in granting the injunction and in not dismissing the Complaint.

(b)

The complaint (5a-20a) against the City officials and the Board of Directors of the Hospital Corporation can be divided into five categories:

1. Actions with respect to fixing the Medicaid reimbursement rates given to Logan Hospital. (pars. 2, 3, 4, 40)
2. Actions mandating the treatment of emergency cases which result in an annual deficit of \$1 Million annually. (pars. 7, 42, 43, 52)
3. Monies allegedly owed to plaintiff under Ghetto Medicine Program instituted pursuant to Chapter 967 of the Laws of the State of New York for 1968 and the cancellation of a Community Mental Health and After Care Center. (Pars. 8, 45)
4. Actions with respect to terminating the ambulance feeder services of Logan Hospital. (pars. 46, 47, 48)
5. Actions with respect to Medicaid monies allegedly owed to Logan Hospital by the City of New York. (pars. 22, 28, 35, 36, 37, 38)

(c)

Plaintiff is in error in alleging that the City of New York has a role in determining the Medicaid reimbursement rate that is paid to it or any other hospital in New York State. Neither the City of New York nor any of its public officials has any powers in regard thereto. (See New York State Public Health Law §2807). In fact, the State of New York not only fixes the rates for the private non-profit or voluntary hospitals but for the private profit making hospitals (proprietary), as well as for all municipal hospitals. Catholic Med. Cen. of Brooklyn & Queens Inc. v. Rockefeller, 305 F. Supp. 1256 (E.D.N.Y., 1969), 305 F. Supp. 1268 (E.D.N.Y., 1969), vacated 397 U.S. 820 (1970) aff'd 430 F. 2d 1297 (2d Cir., 1970), app. diss. 400 U.S. 931 (1970).

Plaintiff's counsel acknowledged on oral argument that the State of New York alone sets this rate. (Transcript, 5).

(d)

Plaintiff is also in error in alleging that the City of New York has any role in compelling Logan Memorial Hospital to treat emergency cases, some of whom are not eligible for Medicaid but allegedly can not afford to pay for the services. Plaintiff alleges and admits that it is compelled to do so by virtue of a law enacted by the Legislature of the State of New York. Nor can plaintiff demonstrate that there is any

legal obligation on the part of the City of New York to pay for such services. See Catholic Med. Cen. of Brooklyn & Queens Inc., supra, pp. 1259, 1263.

(e)

Plaintiff alleges a "conspiracy" to force it "to liquidation" by withholding \$104,632 for services rendered by it under a program pursuant to New York State Laws of 1968, Chapter 967 and also a cancellation of a Community Mental Health and After Care Center with a value of \$300,000 (par. 45). There are no Federal Jurisdictional allegations in regard thereto.

(f)

With respect to the ambulance feeder services, plaintiff alleges that the City officials seek to unilaterally and capriciously terminate the ambulance services and this evidences the complicity of the City of New York in efforts to bankrupt the plaintiff (Pars. 46-48).

Assuming that the actions taken with respect to the ambulance feeder services of Logan constituted a tort, such action alone can not be the basis of a valid Federal claim. Appalachian Power Co. v. American Institute of C.P.A., 177 F. Supp. 345 (S.D.N.Y., 1959) affd. 268 F.2d 844 (2d Cir., 1959), cert. den. 361 U.S. 887 (1959); Buda v. Saxbe, 406 F. Supp. 399 (E.D. Tenn., 1974). See also Urbano v. Sondern, 41 F.R.D. 355 (D.C.

Conn., 1966) affd. 370 F. 2d 13 (2d Cir., 1966), cert. den. 386 U.S. 1034 (1967).

It is also well settled that government itself can engage in activities which compete with private industry and which can adversely affect private industry. By virtue of being government, such activities are considered by some as enabling government to have an unfair advantage over private industry.* However, the legality of such competition cannot be seriously questioned. City of Pittsburgh v. Alco Parking Corp., 417 US. 369 (1974), Puget Sound Co. v. Seattle, 291 U.S. 619 (1934); Denver v. N.Y. Trust Co., 229 U.S. 123 (1913).

General Municipal Law of the State of New York, Section 122-b, empowers cities to render emergency ambulance services themselves or by contract with others (see also N.Y. State McK. Unconsol. Laws, §7385, subd. 8, which provides that the Hospital Corporation can render services itself or by contract. Thus, by terminating the emergency ambulance services rendered by Logan Hospital, the Hospital Corporation was exercising a power given to it by the State Legislature.

*Clearly, Logan Hospital cannot be aided by a gift of public funds which are forbidden to be made to a private corporation, such as Logan Hospital. N.Y. State Constitution, Article VIII, Section 1. Effective January 1, 1970, Article XVII, Section 7 of the N.Y. State Constitution was enacted to permit the lending of money or credit to certain hospitals.

Plaintiff, of course, cannot successfully invoke the privileges and immunities clause of the 14th Amendment to the United States Constitution since it is a corporation. Grosjean v. American Press Co., 297 U.S. 233, 244 (1936).

Nor does plaintiff state a valid equal protection claim. In Puget Sound, supra, the Court said at page 624:

"In conducting the business by State authority the city is exercising a part of the sovereign power of the state which the Constitution has not curtailed. The decisions of this Court leave no doubt that a state may, in the public interest, constitutionally engage in a business commonly carried on by private enterprise, levy a tax to support it, Green v. Frazier, 253 U.S. 233; Jones v. Portland, 245 U.S. 217, and compete with private interests engaged in a like activity. Standard Oil Co. v. Lincoln, supra; Madera Water Works v. Madera, 228 U.S. 454; Helena Water Works Co. v. Helena, 195 U.S. 383.

We need not stop to inquire whether the equal protection clause was designed to protect the citizen from advantages retained by the sovereign, or to point out the extraordinary implications of appellant's argument when applied to expansions of government activities which have become commonplace. It is enough for present purposes that the equal protection clause does not forbid discrimination with respect to things that are different. The distinctions between the taxing sovereign and its taxpayers are many and obvious."

Thus, it can not be seriously controverted that whether the actions of the Hospital Corporation be attacked as a prima facie tort or as a violation of the equal protection clause of the 14th Amendment to the United States Constitution, the decision to favor

a municipal hospital, Sydenham, over a private hospital, Logan, whether wise or unwise, does not give rise to a valid Federal claim. See also Denver v. New York Trust Co. and City of Pittsburgh v. Alco Parking Corp., supra.

The favoring of government of its own interests, by a law which discriminates against the United States, has also been upheld in United States v. Burnison, 339 U.S. 87 (1950).

(g)

The role of the City of New York, in administering the Medicaid program relating to services performed by non-profit hospitals in general and Logan Hospital in particular, is set forth in the affidavit of Aaron Klitenick, Chief of the Division of Charitable Institutions of the Office of the Comptroller of the City of New York. This affidavit was submitted in support of the City's motion to dismiss the action that had been instituted by Logan Hospital as debtor, which action was transferred to Judge Owen.

The affidavit, in part, reads as follows

(42a-44a):

"3. The aforesaid Division of Charitable Institutions prospectively reimburses voluntary hospitals for medical care which they provide to Medicaid patients. Medicaid is a medical assistance program for the indigent, established under Title 11 of the New York Social Welfare Law, §§ 363 et seq., enacted pursuant to the Health Insurance for the Aged Act. 42 U.S.C. § 1395 et seq.

"4. The eligibility of persons for medical assistance under the Medicaid program is determined in accordance with criteria set forth in N.Y. Social Welfare Law § 366. The reimbursement rates for medical care rendered to persons eligible under the program are set by the New York State Commissioner of Health and the New York State Director of the Budget pursuant to N.Y. Public Health Law § 2807.

"5. The City is reimbursed by the State for seventy-five percent of the payments it properly makes to voluntary hospitals for services rendered by them to eligible Medicaid patients in accordance with the rates set by the State. The Federal Government reimburses the State for fifty percent of its costs under its Medicaid program.

"6. The voluntary hospitals claim that, because of their cash flow problems, they must be reimbursed prospectively for services which they are to render Medicaid patients. For this reason, the City agreed to make advances out of its own funds to the hospitals as pre-payments for services to be rendered by them in the future to Medicaid patients and, in consideration of such advances, the hospitals agreed that the advances be recouped by the City from any amounts which might thereafter become due to them for rendering such services.

"7. Arthur C. Logan Memorial Hospital (Logan) participated in the above-described agreement. In accordance with the agreement, the City periodically made advances to Logan at its request. However, as of the filing of its arrangement petitioner on October 26, 1976, Logan had failed to render services to Medicaid patients of a value equivalent to the advances made to it by the City.

"8. According to the books and records of your deponent's division, Logan was in deficit to the City in the sum of \$7,310,621.38 on October 26, 1976. This indebtedness arose because the advances made by the City to Logan had exceeded

the billings submitted by Logan for services rendered to Medicaid patients by that amount. The aforesaid indebtedness of Logan was thereafter reduced by \$1,264,691.43 because of Logan's later submission of additional bills for services rendered to Medicaid patients prior to October 26, 1976. Accordingly, Logan's indebtedness to the City as of October 26, 1976, now amounts to \$6,045,929.95, for which the City has a bona fide claim against Logan." * * *

(h)

The claim for more than \$2,000,000 for services rendered to Medicaid patients is amplified (1) by the complaint in the action commenced on the bankruptcy proceeding which was transferred to Judge OWEN and (2) by the affidavit of the Executive Director of plaintiff Hospital in the bankruptcy proceeding in which it is admitted that the City of New York had over-advanced millions of dollars to plaintiff Hospital. (47a, 50a).* Plaintiff's counsel, on oral argument, also admitted that the City claims to have over-advanced 8 or 9 millions of dollars. His argument was that the City should prove its claim before the Bankruptcy Court. (Transcript 19-21). Plaintiffs Counsel also asserted (Transcript 23):

"The City can't recoup that money under the Medicaid Act unless they comply with certain procedures under that Act, and they haven't done that" **

*For the information of the Court, annexed hereto as Addendum C is a list of plaintiff's ten largest creditors, indicating \$6,417,459.00 owed to the City of New York (M.C.A. Advances)

**This statement is at variance with the statement made by plaintiffs' counsel, in the Bankruptcy Proceeding, on November 9, 1976 in which he said "The specific problem that brought us to this Court is that the City of New York, well within its right, it appears, was attempting to recoup on advances that had been made to the hospital over a period of some years". (Transcript pp. 4-5, November 9, 1976 - No. 76 B2425)

Plaintiff also admitted that monies were withheld by the City as a result of a change in City policy by which it sought to reduce the over-advances of City Tax Levy Funds given to all non-profit hospitals (51a).

The complaint (par. 51) alleges that the defendants, City and State of New York's failure to pay the sums sued for herein.... violates the Supremacy Clause of the U.S. Constitution, Article VI, in that said acts are in contravention of Federal regulation in an area pre-empted by said regulations and legislation (17a).

However at no time was plaintiff's counsel able to explain how the action of the City in applying some of plaintiffs Medicaid billings as a partial reduction to the millions of dollars "loaned" to plaintiff, interest free, (over-advances) violated any Medicaid regulation or how it violated "certain procedures under that act."

It cannot be disputed that there is no Medicaid regulation or Federal policy which requires that any amount of interest free "loans" (over-advances) that a fiscal administrator of the Medicaid program, be it the City of New York or a private insurance company, must give to a provider of Medicaid services.

Nor can plaintiff successfully argue that Medicaid monies due a provider are exempt from claims of creditors by virtue of any provision of the act or

regulations. In Sasse, et. al. v. Ottley, et al., 77 Civ. 1570,* Mr. Justice Broderick denied a motion for a preliminary injunction and ruled that neither the Medicaid Act nor the Social Services Law of the State of New York prevent a judgment creditor from placing a lien on Medicaid funds payable by the City of New York to a judgment debtor nursing home. The action had been brought by 3 Medicaid patients and a nursing home owner who claimed that restraining notices placed by the judgment creditor violated 42 U.S.C. §1396 (a)(18). The Court held that jurisdiction was properly invoked since the case involved the interpretation and application of a federal statute but decided that the aforementioned statute was inapplicable.

Thus, the claim is in reality simply one for services rendered to Medicaid patients at a rate fixed by State law which has not been paid because the City has a valid defense that the plaintiff owes it a larger sum than demanded by plaintiff. The fact that 50% of the sum demanded of the City is Federal funds does not transmute this into a valid Federal claim, as the Court erroneously held. If the test of determining a valid Federal claim were simply to ascertain whether federal funds are alleged to be wrongfully withheld, the Federal Court would then have juris-

*For the convenience of the Court the memorandum decision is annexed hereto as Addendum D.

diction of innumerable disputes involving the Food Stamp Program, the Day Care program, all Anti-Poverty Programs and the like which involve Federal funding, but which are administered by the States. Such, however is not the test.

As stated in McFadden Express, Inc. v. Adley Corporation, 240 F. Supp. 791 (D.C. Conn., 1965) at p. 794:

"For federal question jurisdiction to exist, a controverted question of federal law must form a substantial part of the plaintiff's case, e.g., Gully v. First Nat'l Bank, 299 U.S. 109, 57 S. Ct. 96, 81 L. Ed. 70 (1936). Cf. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 70 S. Ct. 876, 94 L. Ed. 1194 (1950). The remedies which the plaintiffs seek are founded on alleged breaches of contracts. In all of its essential features the case made by the plaintiffs' complaint is based upon contracts negotiated at arms length in the open market, and they owed nothing to federal legislation. Every question which is raised depends for decision upon conventional local or general common law concepts and doctrines of damages applicable in suits to enforce purely private rights." (Emphasis supplied)

In affirming the opinion below, this Court stated (346 F. 2d 424) at pp. 425-426:

"In testing the complaint for sufficient assertion of a federal question, we apply, *faute de mieux*, the approach utilized with respect to 28 U.S.C. §1338 in T.B. Harms Co. v. Eliscu, 339 F. 2d 823, 826-828 (2 Cir. 1964), cert. denied, 85 S. Ct. 1534 (1965), namely, whether the complaint is for a remedy expressly granted by an act of Congress or otherwise "inferred"

from federal law, or whether a properly pleaded "state-created" claim itself presents a "pivotal question of federal law," for example because an act of Congress must be construed or "'federal common law' govern[s] some disputed aspect" of the claim."

Applying the principles enunciated in the aforementioned opinions, it is respectfully submitted that Judge Owen was in error in deciding that federal jurisdiction existed because federal Medicaid monies were involved.

Under these circumstances, since it is clear that no valid federal claim exists, this Court should dismiss the complaint. DECKERT v. INDEPENDENCE CORP., 311 U.S. 282, 287 (1940)

CONCLUSION

The order granting the preliminary injunction should be reversed and the complaint dismissed.

July 25, 1977

Respectfully submitted,

W. BERNARD RICHLAND
Corporation Counsel
Attorney for Appellants

Milton Weinberg
Steven Goldenberg
George Sawaya
of Counsel

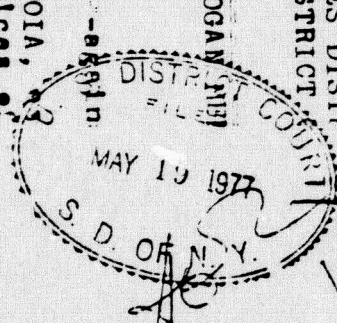
ADDENDUM A

Index No. 1216 Civ.

UNITED STATES DISTRICT
SOUTHERN DISTRICT

ARTHUR C. LOGAN, JR.

PHILIP L. TOIA,
Social Services of
York, et al.,



NOTICE
TO

W. BERNA
ADRIKXND

Boi
N.Y.
H.I.

ENDORSED MEMORANDUM

LOGAN v. TOIA 77 Civ. 1216

The City defendants move to dismiss pursuant to R.12(b)(1) and (6), for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

At the very least, the complaint alleges a wrongful withholding of federal medicaid monies by defendants. There is, therefore, federal jurisdiction and allegations supporting a valid cause of action.

The defendants' motion to dismiss is denied.

So Ordered.

May 18, 1977

[Signature]
United States District Judge

Due and timely service of a
within
is hereby admitted.
New York,

To

Attor.

Attor.

MICROFILM

MAY 19 1977

ADDENDUM B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
In The Matter :
-Of- :
ARTHUR C. LOGAN MEMORIAL HOSPITAL, :
INC. f/k/a KNICKERBOCKER HOSPITAL, :
Debtor, :
ARTHUR C. LOGAN MEMORIAL HOSPITAL, :
INC., :
Plaintiff, :
-against- :
THE CITY OF NEW YORK, :
Defendant. :
----- x

In Proceedings for
an Arrangement

No. 76 B 2425

OPINION

APPEARANCES:

LEVIN & WEINTRAUB, ESQS.
Attorneys for the Debtor
225 Broadway
New York, New York
Bruce H. Roswick, Esq., Of Counsel

CORPORATION COUNSEL OF THE CITY OF NEW YORK
Attorneys for the Defendant
Municipal Building
New York, New York 10007
Cornelius F. Roche, Esq., Of Counsel

JOEL LEWITTES, BANKRUPTCY JUDGE:

This decision is occasioned by a challenge by the defendant City of New York ("City") to the exercise of this Court's summary jurisdiction, Section 23a of the Bankruptcy Act, 11 U.S.C. §46a, in this action by a Chapter XI debtor before this Court.

Arthur C. Logan Memorial Hospital, the debtor ("debtor") filed its Chapter XI petition on October 26, 1976 pursuant to Bankruptcy Act Sections 301 et seq., 11 U.S.C. §701 et seq. This Chapter XI debtor, as debtor-in-possession, Section 342, 11 U.S.C. §742, was authorized by the Court to operate its business and manage its property, Section 343, 11 U.S.C. §743. As a debtor-in-possession it was thereby invested with the title and powers of a bankruptcy trustee under Section 342 of the Act..

On March 18, 1977 the debtor filed a complaint against the City in accordance with the adversary route method now prescribed by Part VII of the Bankruptcy Rules, 411 U.S. 1068, applicable in Chapter XI cases by Rule 11-61, 415 U.S. 1037.

The complaint, shorn of its pleading frills, seeks a turnover from the City of funds allegedly due the debtor in the amount of \$2,106,921.54 in accordance with a prospective reimbursement formula promulgated by New York State in implementation of Title XIX of the Social Security Act, 42 U.S.C. §§1396 et seq. and the regulations thereunder. Those regulations require, as part of the state's Plan for Medical Assistance (N.Y. Social Services Law §363 - §369, 52A McKinneys Consol. Laws of N.Y.), payment to hospitals of the reasonable cost of in-patient hospital services. See Catholic Medical Center of B'klyn and Queens, Inc., v. Rockefeller, 305 F. Supp. 1256, 1258 (E.D.N.Y. 1969), vacated and remanded, 397 U.S. 820, aff'd 430 F.2d 1297 (2d Cir.), appeal dismissed, 400 U.S. 931 (1970); Mass. General

Hospital v. Sargent, 397 F. Supp. 1056, 1061 (D. Mass. 1975).

The City, which is reimbursed by the State for seventy-five per cent of the payment it properly makes to hospitals for services rendered by them to eligible Medicaid patients in accordance with the rates set by the State (Lindsay v. Wyman, 372 F. Supp. 1360, 1363 [S.D.N.Y.], aff'd sub nom. Beame v. Lavine, 419 U.S. 806 [1974]) claims that the debtor owes it, for \$6,045,929.95 advanced to the debtor by the City, as of October 26, 1976, the date the debtor filed its Chapter XI petition. Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, the City moved to dismiss the instant complaint on the ground that this Court lacks summary jurisdiction to determine this controversy.¹

It is well-established that a bankruptcy court is invested with the power to determine the rights and claims to property which is in the actual or constructive possession of the Court. Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940); Cline v. Kaplan, 323 U.S. 97 (1944).

Actual possession exists where the bankrupt was in possession at the time the bankruptcy petition was filed.

¹ Rule 712, 411 U.S. 1074, is the bankruptcy rules version of Rule 12, F.R. Civ. P. This is one of the accepted modes for raising such objection under Section 2a(7) of the Act, 11 U.S.C. §11a(7), Congress' response to Cline v. Kaplan, 323 U.S. 97 (1944).

Thompson v. Magnolia Petroleum Co., supra, at 630. Constructive possession exists where a third party actually in possession of the property asserts a merely colorable claim to it, i.e., a claim which is a mere pretense, or one presenting no contested issue of law of fact with reasonable room for controversy. Sahn v. Pagano, 302 F. 2d^{p.629}/(2d Cir.), cert. denied, 371 U.S. 819 (1962). If, however, "a third person asserts a bona fide or substantial claim adverse to the bankrupt, he as a right to have merits of his claim adjudicated in a plenary suit." In re Miracle Mart, Inc., 293 F. Supp. 417, 419 (S.D.N.Y. 1968), (emphasis in text).

There can be no quarrel here that this Court does not have actual possession of the fund. Nor is this a case embracing a dispute over claims arising in the ordinary administration of a bankruptcy case and thus subject to this Court's exclusive and presumptive power. Katchen v. Landy, 382 U.S. 323 (1965). Here, if jurisdiction exists at all, clearly it must be on the basis of constructive possession. Before the Court may direct a turnover of property so held, the Court must first determine the reach of its own jurisdiction over this suit. That the bankruptcy court has the power to so determine seems beyond question. Irby v. Corcy, 95 F. 2d 963 (5th Cir. 1938); Atlanta Flooring and Insulation Co., Inc. v. Russell, 146 F. 2d 884 (5th Cir. 1945). This preliminary inquiry is limited to a determination of the substantiality of the adverse claim.

If such claim is indeed substantial, and not merely colorable, the bankruptcy court "must decline to determine the merits and dismiss the summary proceeding." Harrison v. Chamberlin, 271 U.S. 191, 194 (1926).

The debtor maintains that there is due and owing to it a fund amounting to \$2,106,921.54. According to the debtor this 'fund' is derived from numerous sources within the complex accounting procedures of third-party reimbursement and that it represents a liability from the City to the debtor for past services rendered by the debtor to qualified Medicaid patients.

The City contends, however, that under the prospective reimbursement formula the City advanced out of its own funds pre-payments for services to be rendered in the future to Medicaid patients and, in consideration for such advances, the debtor agreed that the advances be recouped by the City from any amounts which might thereafter become due to the City for rendering such services. The City represents, as noted earlier, that the debtor's indebtedness to the City, as of October 26, 1976 presently amounts to \$6,045,929.95.

These factual disputes leave no doubt that the City's adverse claim is substantial and not merely colorable.

As the Court observed in Harrison v. Chamberlin, supra

"In the present case it clearly appears that validity of the [defendant's] claim depend[s] upon disputed facts as to which there [is] a conflict of evidence, as well as a controversy in matter of law. Its determination

[would involve] 'fair doubt and reasonable room for controversy' both as to fact and law." id at 195.

Since the City's claim is therefore substantial, and not merely colorable, the bankruptcy court lacks jurisdiction over this controversy in the face of the objection raised in the motion to dismiss.

For the above reasons this suit is dismissed without prejudice to the institution of a plenary action by the debtor. The attention of counsel is invited to the provisions of Rule 915(b), 411 U.S. 1098, applicable to Chapter XI cases by Rule 11-63, 415, U.S. 1039. This Rule, in relevant part, provides that where an objection to the jurisdiction of an adversary proceeding is sustained, as here, the bankruptcy judge shall dismiss such proceeding or transfer it to the civil docket of the district court, as may be appropriate. As this dispute, among others, is already before District Judge Owen, in a suit between the same parties (and others), 77 Civ. 1216, it seems, under Rule 915(b), appropriate not to dismiss this suit but to transfer it to Judge Owen.

The defense of want of summary jurisdiction is sustained. Submit order providing for disposition under Rule 915(b).


JOEL LEWITTES
Bankruptcy Judge

Dated: New York, New York

May 3, 1977

ADDENDUM C

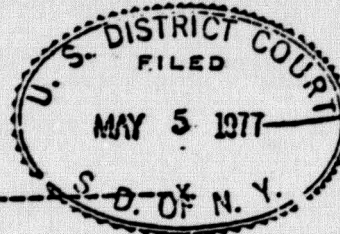
ARCHUR C. LOGAN MEMORIAL HOSPITAL, INC.
C/k/a KNICKERBOCKER HOSPITAL

EXHIBIT A

1. New York City M.C.A. Advances
City Controller's Office
139 Centre St.
New York, N. Y. 10013 \$ 6,417,459.00
2. Local 1199
310 W. 43 St.
New York, N. Y. 10036 1,034,169.00
3. Medical Malpractice Insurance
110 William St.
New York, N. Y. 10038 318,778.00
4. Blue Cross/Blue Shield of Greater New York
622 Third Avenue
New York, N. Y. 10017 259,207.00
5. Max O. Urbahn Associates, Inc.
521 Fifth Ave.
New York, N. Y. 10017 60,410.92
6. American Hospital Supply Company
120 Raritan Center Parkway
Edison, N. J. 08817 45,468.41
7. Con Edison
4 Irving Place
New York, N. Y. 10003 41,718.00
8. Hospital League Pension Fund
60 East 42nd St.
New York, -N. Y. 10017 30,200.00
9. State Insurance Fund
P. O. Box 551
Albany, N. Y. 30,015.85
10. Johnson and Higgins
95 Wall St., New York, N. Y. 10005 22,825.00

ADDENDUM D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



JOHANNE SASSE, ALLAN LESTER, CHARLOTTE
CZAKO, and BRUCKNER NURSING HOME,

: 77 Civ. 1570
: (VLB)

Plaintiffs,

: MEMORANDUM
: DECISION

-against-

PETER OTTLEY, as President and MOSES
BRAUNSTEIN, MEYER TEMPKIN, DR. LEE LICHTMAN, :
ROBERT CARR and JOHN KELLEY, as Trustees, of :
LOCAL 144 HOTEL, HOSPITAL, SEIU, AFL-CIO, :
JOSEPH A. CALIFANO, Secretary of United States :
Department of Health, Education and Welfare, :
PHILLIP L. TOIA, Commissioner of the Depart- :
ment of Social Services of the State of New :
York, :
ROBERT P. WHALEN, Commissioner of the New :
York State Department of Health, and :
J. HENRY SMITH, Commissioner of the City of :
New York Department of Social Services, :

Defendants.

-----X
VINCENT L. BRODERICK, U.S.D.J.

Plaintiffs Johanne Sasse, Allan Lester, and Charlotte
Czako (the "plaintiff-patients") are patients in plaintiff
Bruckner Nursing Home ("Bruckner"), and are among 194 of
the 196 residents therein who are recipients of medical
assistance benefits pursuant to the "Medicaid Program",
42 U.S.C. §§1396, et seq. Defendants are the president
and trustees of Local 144 Hotel, Hospital, Nursing Home

& Allied Health Services Union, SEIU, AFL-CIO ("Local 144"), the union representing employees of Bruckner; the Secretary of the United States Department of Health, Education and Welfare; the Commissioner of the Department of Social Services of the State of New York; the Commissioner of the New York State Department of Health; and the Commissioner of the City of New York Department of Social Services ("City Department").

On or about January 26, 1977, defendant Local 144 obtained judgments in excess of \$30,000 against plaintiff Bruckner. After the entry of those judgments, Local 144 served restraining notices under N.Y. C.P.L.R. §5222 and issued execution to the Sheriff of New York City for service upon the City Department, the local disbursing agent of Medicaid funds. At the time the restraining notices were served, Bruckner had already rendered services to the plaintiff-patients, and had billed the City Department for those services. All parties herein agreed that, for purposes of this action, liens had been established by defendant Local 144 upon funds in the hands of the City Department which were payable, immediately upon audit, to plaintiff Bruckner, on account of medical services already rendered to, inter alia, the plaintiff-patients.¹

Plaintiffs claim that the restraining notices placed by Local 144 are prohibited by Title XIX of the Social Security Act (42 U.S.C. §§1396, et seq.) in that under 42 U.S.C. §1396a(a) (18) they constitute impermissible liens against the property of the plaintiff-patients. They claim, in this connection, that the service of the allegedly prohibited restraining notices without notice to the plaintiff-patients, and opportunity for them to be heard, violated the Due Process Clauses of the Fifth and Fourteenth Amendments. Plaintiffs seek a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining defendants from interfering pendente lite with Medicaid payments by the City Department to Bruckner, and enjoining the defendants from enforcing, or otherwise executing with respect to, the restraining notices served upon the City Department.

A temporary restraining order ("TRO") was granted on April 1, 1977,² and after a hearing on April 5 it was modified and extended to April 21, 1977.³ A second hearing was held on April 12, 1977. No evidence was adduced at either hearing: all parties stipulated to the substantive facts set forth in this memorandum.

Jurisdiction is properly invoked under 28 U.S.C. §1331(a) as this case involves the interpretation and application of a federal statute, 42 U.S.C. §1396a(a) (18), and plaintiffs

reasonably allege that the amount in controversy exceeds \$10,000 exclusive of interest and costs. Cf., Aitchison v. Berger, 404 F.Supp. 1137, 1143 (S.D.N.Y. 1975), aff'd. 538 F.2d 307 (2d Cir. 1976). Plaintiffs also allege violation of the Fifth and Fourteenth Amendments of the Constitution.

The Medicaid Program, 42 U.S.C. §§1396 et seq., authorizes the appropriation of monies to be made available "to States which have submitted, and had approved by the Secretary of Health, Education, and Welfare, State plans for medical assistance" to indigents. The program provides that the federal government will participate with state and local governments in providing funds to pay for necessary medical services rendered. For a state government to qualify, the state's plan for medical assistance must meet the criteria set forth in Section 1396a(a).

Sub-paragraph (16) of Section 1396a(a) requires a State plan for medical assistance to "provide that no lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the plan (except pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual) ..." (emphasis added).⁴

New York State has elected to participate in the Medicaid Program. The New York provision enacted to meet the requirements of §1396a(a) (18) is set forth in the New York State Social Services Law §369⁵, which by its terms comports with the requirements of §1396a(a) (18) :

(a) no lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under this title, except pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual, and

(b) there shall be no adjustment or recovery of any medical assistance correctly paid on behalf of such individual under this title, except from the estate of an individual who was sixty-five years of age or older when he received such assistance, and then only after the death of his surviving spouse, if any, and only at a time when he has no surviving child who is under twenty-one years of age or is blind or permanently and totally disabled, provided, however, that nothing herein contained shall be construed to prohibit any adjustment or recovery for medical assistance furnished pursuant to subdivision three of section three hundred sixty-six of this chapter.

Thus at issue here is the statutory and constitutional applicability of 42 U.S.C. §1396(a) (18) (and of New York State Soc. Serv. L. §369) to the restraining notices served upon the City Department by Local 144. Cf., Aitchison v. Berger, 404 F.Supp. 1137 (S.D.N.Y. 1975), aff'd, 538 F.2d 307 (2d Cir. 1976).

I find that the liens placed by Local 144 upon funds payable to Bruckner by the City Department do not violate 42 U.S.C. §1396a(a) (18) or N.Y. Soc. Serv. L. §369, since neither of those provisions applies to such liens⁶. Thus I do not reach the constitutional question suggested by plaintiffs.

The instant restraining notices stem from controversy between a union of nursing home employees and their nursing home employer. The judgments to which they relate are against the nursing home: it is property of the nursing home, not property of the beneficiaries, which the judgment creditors seek to reach. Congress did not intend, in enacting §1396a(a) (18), to insulate nursing homes from their judgment creditors. The notices served by the Funds upon the City Department are intended to restrain payment to the nursing home of monies owed by the City Department, as agent for the governmental participants in the Medicaid Program, to that nursing home for services already provided under the Program. Ninety-eight percent of the patients of the judgment debtor, Bruckner, are receiving Medicaid assistance. If this Court were to hold that Bruckner's judgment creditors were not permitted to place liens on monies due Bruckner in the hands of the City Department it would severely and unjustly interfere with the rights of the creditors to what is for all practical purposes the judgment debtor's only real source of funds.

Nursing homes, as are other "providers" under Medicaid, are reimbursed for services already furnished. This inevitably presents cash flow problems. The confidence of creditors in nursing homes which participate in the Medicaid Program, and their willingness to deal with such nursing homes on other than a cash-on-the-barrelhead basis, would be severely shaken if this Court were to interpret 42 U.S.C. 1396a(a) (18) as mandating the suspension of the effectiveness of New York's lien laws with respect to Medicaid Program providers.

The "anti-lien" provision requires that a state plan for medical assistance "provide that no lien may be imposed against the property of any individual ... on account of medical assistance paid or to be paid on his behalf under the plan ..." (emphasis added). The regulation promulgated to implement 42 U.S.C. §1396a(a) (18) provides the following definition of the term "property":

Under this regulation, the term "property" includes not only the homestead but all other personal and real property in which the recipient has a legal interest; and a money payment under another program may not be reduced as a method of recovery for vendor payments incorrectly paid under Title XIX of the Act.

45 C.F.R. §249.70 (1976).

The only reasonable construction of the prohibition with respect to liens on "property" as used in 42 U.S.C. §1396a(a) (18) is that the prohibition forbids liens upon property of the recipients of medical assistance -- in this case the plaintiff-patients, inter alia.

The Medicaid funds here restrained are to be paid directly and only to Bruckner for services theretofore rendered to Medicaid recipients. Bruckner has billed the City Department directly, and immediately upon auditing is entitled to payment for services already furnished.

As the medical services for which the funds are being restrained have already been provided, plaintiff-patients do not have any property interest therein. Moreover, the plaintiff-patients, although recipients of the services, would not be liable in the event that the Medicaid funds are not paid to Bruckner. See Amsterdam Memorial Hospital v. Cintron, 52 A.D.2d 404, 384 N.Y.S.2d 225 (3rd Dept. 1976).

The prohibition of 42 U.S.C. §1396a(a) (18) was interpreted in Wilczynski v. Harder, 323 F.Supp. 509 (D. Conn. 1971), as intended to restrict state efforts to recoup, from beneficiaries of medical assistance, monies of the federal or state or local governments which have been expended pursuant to the plan:

Although the meaning of the phrase "on account of" as used in the statute is not entirely free from doubt, it would seem to us that the most obvious meaning is to prohibit state provisions designed

to recoup state money spent on medical payments pursuant to the plan, ... The same sentence in the statute which imposes the lien prohibition also prohibits any "adjustment or recovery (with some exceptions not here relevant) of any medical assistance correctly paid on behalf of [any] individual under the plan." 42 U.S.C. §1396a(a) (18). This strengthens the view that the concern of Congress was with state efforts (either by lien on the recipient's property or direct action against him) to require the recipient, where possible, to make restitution of moneys spent on his behalf under the Title XIX program.

323 F.Supp. at 516. This interpretation is consistent with the Congressional purpose, to the extent such purpose is apparent.⁷ It is clear that the intended beneficiaries of this statute are individuals in need of medical assistance. It is the property of those individuals -- and only that property -- which Congress sought to insulate from lien.

In sum, the restraining notices do not constitute "liens" imposed in contravention of §1396a(a) (18).

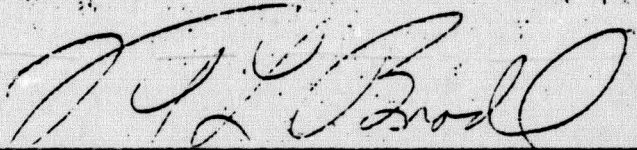
Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247 (2d Cir. 1973), enunciates the principles that for a preliminary injunction to issue, the movant must establish either the probability of success on the merits or the presence of questions of such moment with respect to the merits as to be truly litigable:

The settled rule is that a preliminary injunction should issue only upon a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

483 F.2d at 250 (emphasis in original).

Plaintiffs have failed to satisfy either of the prongs of Sonesta which address the "merits", and thus this Court need not consider the second prongs of either of the alternative standards articulated in Sonesta.⁸

An order dated April 21, 1977 has been made herein vacating the temporary restraining order made on April 1, 1977, and denying plaintiff's motion for a preliminary injunction. The foregoing constitutes findings of fact and conclusions of law forming the predicate for the order of April 21.



Vincent L. Broderick, U.S.D.J.

May 5, 1977

Footnotes:

1. While the restraining notices themselves apparently do not constitute liens under New York Law (see Matter of International Ribbon Mills, 36 N.Y.2d 121, 365 N.Y.S.2d 808 (1975)), the execution to the sheriff did create liens under N.Y. C.P.L.R. §5234.

2. The TRO enjoined the defendants from enforcing or otherwise executing upon the restraining notices already served upon the City Department; enjoined the defendants from taking further action to attach Medicaid payments; restrained the City, State and Federal defendants from making any payments to Bruckner; and dispensed with the necessity of filing an undertaking.

3. As modified, the TRO was expanded to include the additional parties defendants, Moses Braunstein, Meyer Tempkin, Dr. Lee Lichtman, Robert Carr, and John Kelley, all as trustees of Local 144. It was further ordered that all monies payable by the City Department to Bruckner in excess of \$39,125.64 (the amount of the judgments against Bruckner), be paid; and that the said sum be retained by the City Department pending further order of this Court. Finally, Bruckner was directed to post an undertaking in the amount of \$6,000, to secure defendants for such costs and damages, including sheriff's poundage fees, as may be incurred as a result of the granting of the TRO.

4. The full text of 42 U.S.C. §1396a(a) (18) indicates that the thrust of the statute is to prohibit, or strictly to limit, efforts by states to recoup from patient-beneficiaries, or their estates, amounts paid for medical assistance to those patient-beneficiaries (see pp. 7-9, infra):

(a) A State plan for medical assistance must --

* * *

(18) provide that no lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the plan (except pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual), and that there shall be no adjustment or recovery (except, in the case of an individual who was

65 years of age or older when he received such assistance, from his estate, and then only after the death of his surviving spouse, if any, and only at a time when he has no surviving child who is under) age 21 or (with respect to States eligible to participate in the State program established under subchapter XVI of this Chapter), is blind or permanently and totally disabled, or is blind or disabled as defined in section 1382c of this Title (with respect to States which are not eligible to participate in such program)) of any medical assistance correctly paid on behalf of such individual under the plan.

5. There are several New York State Court decisions interpreting the New York State provision. See generally, Baker v. Sterling, 39 N.Y.2d 397, 384 N.Y.S.2d 128 (1976); Master of Estate of Harris, 387 N.Y.S.2d 796 (Surrogate's Ct. Wayne Co. 1976); In re Estate of Colon, 83 Misc.2d 344, 372 N.Y.S.2d 312 (Surrogate's Ct. Kings Co. 1975).

6. See Wilczynski v. Harder, 323 F.Supp. 509, 516 (D. Conn. 1971), discussed infra, pp. 3-9.

7. The legislative history and commentary are of limited assistance. See S. Rep. No. 404, 89th Cong. 1st Sess., Social Security Amendments of 1965, Pub. L. 89-97, set forth in 1965 U.S. Code Cong. and Adm. News 1943, 2147.

8. To the effect that Sonesta has continued vitality in the Second Circuit see Jacobson & Co., Inc. v. Armstrong Cork Co., 548 F.2d 438, 441, n.2 (2d Cir. 1977).

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

City, County and State of New York, ss.:

being duly sworn, says, that on the 27 day of JULY, 19 77
 at No. 500 - 5TH AVE. in the Borough of _____ in The City of New York, he served three copies
 of the annexed BRIEF upon MR. DOUGLAS HAY WOOD Esq.,
 the attorney for the PLTFF - RESP. in the within entitled action by delivering
 three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and
 leaving the same with him.

Sworn to before me, this 27
 day of JULY, 1977 }

Garthfield Francis

BRUCE S. GARNER
 Commissioner of Deeds
 City of New York - No. 4 1786
 Commission Expires May 1, 1978

Bruce S. Garner

